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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

NO. 74-514

HOWARD NICHOLAS JOHNSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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2 Wright, Federal Practice & Procedure, Criminal § 374 28, 31, 32

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petitioner, HOWARD NICHOLAS JOHNSON, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered on June 28, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 496 F.2d 1131-1138, inclusive, and, for the convenience of this Court, appears herein at Appendix A, *post*. That portion of the opinion below upon which this petition is based is reported at 496 F.2d 1136 *et seq.* of the 1974 slip opinions of the Fifth Circuit.

No written findings of fact or conclusions of law were made by the District Court in this proceeding without a jury. The Trial Judge conditioned waiver of a jury trial on defendant's waiver of his right to request special findings of fact and conclusions of law pursuant to Rule 23(c), F.R.Cr.P. The Court of Appeals considered the statements casually made

by the trial judge from the bench during the course of rendering its verdict and at the time of sentencing to serve as evidence of the Trial Court's special findings of fact. While the record in the Court below did not include all of the comments made by the Trial Judge in the course of its decision that petitioner was guilty of seven of the nine counts alleged against him, all portions of the transcript relied upon by the Court below to cure the error of conditioning the grant of a bench trial upon the waiver of the right to request special findings of fact and conclusions of law appear in the Appendix to the Briefs filed in the Court below, Volume II, PP. 526-529i, and are reproduced herein at Appendix B, *post*.

JURISDICTION

The order of judgment of the United States Court of Appeals for the Fifth Circuit was rendered on June 28, 1974. A timely petition for rehearing was denied on October 3, 1974. A stay order was sought from the United States Court of Appeals pending this application for a writ of certiorari, urging that the opinion below conflicted with the opinions on the same subject rendered by the Third and Ninth Circuit Courts of Appeals and that this case would likely be heard by this Honorable Court to resolve the conflict among the Circuits on the points of law presented by this petition. The Court below denied that stay application.

Following issuance of the mandate of the Court below, the District Court in

which petitioner was convicted stayed enforcement of its judgment for a period of thirty (30) days in order that this petition might be filed prior to the arrest of petitioner and enforcement of the judgment obtained against him in the manner of which instant complaint is made. The District Court stay was also sought, and apparently based, upon petitioner's assertion that imprisonment at the present time would interrupt petitioner's preparation for trial on another indictment in the Eastern District of Louisiana and that time was needed in which to make provision for the maintenance of petitioner's family during his impending absence. An application to Mr. Justice POWELL, Circuit Justice for the Fifth Judicial Circuit of the United States, is anticipated should

the District Court, at the expiration of the said thirty day period, subsequent to the filing of this petition, refuse to further stay enforcement of the judgment pending review by this Honorable Court.

The jurisdiction of this Honorable Court to review on writ of certiorari the final judgment of the United States Court of Appeals, affirming the final judgment and sentence of the United States District Court for the Northern District of Georgia in this Federal criminal case, is vested, and is invoked by petitioner under, 28 U.S.C. § 1254(1). *See*, also, Rule 19(1)(b) of the Rules of this Honorable Court.

QUESTIONS PRESENTED

1. Whether a District Judge, entertaining a motion under Rule 23(a), F.R.Cr.

P., to waive trial by jury and to proceed before the Court sitting without a jury, pursuant to Rule 23(c), F.R.Cr.P., may properly condition the grant of a bench trial upon the waiver by the defendant of his right to request special findings by the Trial Judge which, upon timely request, would be the mandatory duty of the Trial Judge under Rule 23(c), F.R.Cr.P.

2. Whether the error resulting from the denial of special findings in a situation where the Trial Court had improperly coerced the defendant to waive his right to request special findings may be cured by casual remarks made by the Trial Judge in the course of rendering a verdict and in pronouncing sentence upon the defendant.

3. Whether, if such error may be

so cured, the Trial Court's comments, casually made and not intended to evidence the Court's belief of defendant's guilt beyond a reasonable doubt, were sufficient to substitute for special findings under Rule 23(c), F.R.Cr.P.

STATUTES AND RULES INVOLVED

This case involves Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a) (1970), Section 5(a) of the Securities Act of 1933, 15 U.S.C. §77e(a) (1970), 18 U.S.C. §1341 (Supp. 1974), and Rule 23(c), F.R.Cr.P., as amended by this Court in 1966. The text of the portions of those statutes pertinent to the issues presented in this petition are set forth as follows:

15 U.S.C. §77q(a) provides:

> It shall be unlawful for any person in the offer or sale of any

securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defrand, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. §77e(a) provides:

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

18 U.S.C. §1341 (Supp. 1974), in relevant part, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish * * * any * * * spurious * * * security, * * * or anything represented to be or intimated or held out to be such * * * spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more

than $1,000 or imprisoned not more than five years, or both. (As amended by P.L. 91-375, §6(j)(11), 84 Stat. 778.)

Rule 23(c), F.R.Cr.P., provides:

> Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and therefore are presented to this Honorable Court in summary fashion.

A nine count indictment was returned in this case, charging petitioner with four counts of violation of 15 U.S.C. §77e(a) (selling unregistered securities by mail); two counts of

violation of 15 U.S.C. §77q(a) (fraudulent sales of securities by mail), and three counts of violation of 18 U.S.C. §1341 (mail fraud).

Prior to the commencement of this trial, defense counsel informed the Court that it was defendant's intent to move, pursuant to Rule 23(a), F.R.Cr.P., for waiver of trial by jury in favor of trial to the Court without a jury as provided in Rule 23(c), F.R.Cr.P. In Chambers, the Trial Judge informed counsel that he would not approve the motion and try this case without a jury unless defendant waived his right under Rule 23(c), F.R.Cr.P., to special findings of fact and conclusions of law. In Court, the Trial Judge acknowledged having made such a condition upon his

grant of defendant's motion for a bench trial, saying (Appendix to the Briefs below, p. 20; Trial Tr. 4):

> THE COURT: You have the right, if you so desire, to waive a jury trial, that is, by your own agreement not to have a jury trial. Do you understand that?
>
> MR. JOHNSON: Yes, sir.
>
> THE COURT: I am also required under the law in a non-jury trial to make findings of fact and conclusions of law, written findings of fact and conclusions of law. However, *I have already advised your lawyer that in the event you would not waive that right that I would proceed to try it by jury*, because I just don't have the time in which to review it later on and make findings of fact and conclusions of law.
>
> You have the right to waive the Judge's written findings of fact and conclusions of law and have him pronounce judgment at the conclusion of the trial—
>
> MR. JOHNSON: Yes, sir.
>
> THE COURT: —on the various counts.

Now, do you understand that?

MR. JOHNSON: Yes, sir.

THE COURT: And do you waive your right to have the judge make findings of fact and conclusions of law in this case?

MR. JOHNSON: Yes, sir, I do.

From the foregoing colloquy between the Court and petitioner, the Court of Appeals concluded (496 F.2d at 1136; slip opinion, Appendix A, *post*, p. 5213):

> Thus the record demonstrates that the district court specifically conditioned the right to a non-jury trial on the waiver of findings of fact.

While noting that the Ninth and Third Circuit Courts of Appeals had previously determined that such a waiver as the one spread upon the record in this case were legal nullities and violative of Rule 23(c), the Court below determined:

* * *A reading of the record in this case establishes that following appellant's trial the district court issued sufficient oral findings of fact to cure whatever error might have arguably resulted from its refusal to make special findings pursuant to Rule 23(c). Thus we pretermit the basic issue here presented for a later case demonstrating actual prejudice.

(496 F.2d at 1136; slip op., App. A, p. 5212)

* * * * * * * *

The Government vigorously contends, however, that the trial court through comments from the bench at the time it delivered its judgment and subsequently at the sentencing hearing elucidated the grounds on which it based its judgment. We agree. Although the reasons delineated at these two hearings were not as complete as they could be, they do suffice as a basis for intelligent appellate review. These observations by the trial court demonstrate to us that the court applied the correct legal principles to the instant case.[8]

It is not necessary for us to answer the precise issue presented to the Ninth and Third Circuits

since we hold that even assuming that error was committed by the trial court's imposition of the condition, this error was nevertheless cured by its subsequent findings from the bench.

(496 F.2d at 1138; slip op., App. A, pp. 4215-16) (Footnotes omitted.)

The "observations by the trial court" that demonstrated to the Court below that the trial court applied the correct legal principles to the instant case are set forth herein *in extenso* with citations to the pages of the Appendix to the Briefs on which such comments appear:

> There is no evidence that this was a restricted sale. Anybody who wanted to buy it could buy that came up and wanted to buy. There was no offer to show the financial status of the company. I attach much more significance in my judgment to the use of the corporations, especially the names, as manipulating facts in the violations charged. I therefore find the defendant guilty also of Counts Six through Nine.

And to sum up, I find the defend- and guilty of One, Two and Three, not guilty as to Counts Four and Five, guilty as to Counts Six, Seven, Eight and Nine. (Appendix to Briefs, p. 526; Tr. 881)

* * * * * * *

THE COURT: * * *I made a judgment based upon the evidence I heard that the defendant was guilty of seven counts—

MR. BAIRD (Defense Counsel): Yes, sir.

THE COURT: —in this indictment. Whether I am right on that or not will depend upon the appellate decision, obviously. But I felt I was right. Otherwise, I would not have done it. But, if I felt there was any doubt really of his innocence I would have so found.

The problem in a case like this, we are dealing with what is known as white collar crimes. We send people off to prison every day for stealing, rape, for assault, narcotics violations, and I guess we have the great national mania about those things. But we also sometimes don't give enough attention to where these people get their justification for doing these things, and that is they see others who are

more affluent that are able to live on the edge of the law and sometimes veer over the wrong side and then they get away with it.

One of the problems we have in the country todya, I think, is that there are too many people who are committing violent crimes really in the name of right, that they have a right to do this. This has been something that's been very disturbing to me, and I think other Americans. And they say, "Well, people in public life, people in business are allowed to steal every day and get away with it."

In spite of his record both in the service and in public life, in spite of the fact he's had injuries, I do not feel that that is any license at all to violate the law. I considered that he violated the law.

I do not consider, as you do, the insignificance of the corporate names that were involved in this case. In fact, I considered them to be very significant.

MR. BAIRD: Well——

THE COURT: And I consider them to be significant, Mr. Baird, because corporations were used and manipulated.

Now I will agree that most any person who's got a high school education or any education at all can sit and look at something and tell whether or not it is the same name, but human experience has shown us that people don't do that a lot of times, and, so, Congress has seen fit to pass laws for the protection of people who don't protect themselves.

Sometimes, unfortunately, I am one of those who doesn't protect himself. However, I don't usually say anuthing about it, because I'm a little ashamed of it because I was stupid. But that happens to all of us.

I can well understand how the people who took these certificates didn't examine them with that much scrutiny, because it had "Television Productions" on it. One of them might have had something else on the back of it, at the end of it, which gave them different names, and they got by the test in the Secretary of State's office many times when probably they shouldn't, because there's too much similarity. Nevertheless, they get by.

I feel that that was not only part—not only significant but was part of the scheme, and, if I didn't feel that way, I probably wouldn't

have found him guilty. Not that alone; there were other factors, too.

Regardless of their innocence or guilt involved in the matter, these two gentlemen that went to Mr. Johnson initially to get him to be their angel, so to speak, but the angel didn't turn out quite to be an angel, and, in spite of their ineptness in some matters, I don't know that they had any involvement one way or the other, they still turned out, they didn't get——they didn't know what was going on in Florida, the corporation was being used by Mr. Johnson and his wife.

Whether his wife did that at his insistence or not, as many wives do, I don't know. That's neither here nor there.

I am taking into consideration that Mr. Johnson doesn't have any prior record, but I am also taking into consideration the seriousness of this offense, and I feel there is a duty on the part of courts, not only this court but all courts, to view this type crime just as seriously as it views crimes of violence, and I view this crime just as seriously as I view crimes of violence.

So, in view of that, in view of

> what I have said, I am going to sentence Mr. Johnson to the custody of the Attorney General for a period of three years on Counts One, Two, Three, Six, Seven, Eight and Nine, the sentence on each count to run concurrently with each other, which means that it is a three-year sentence.
>
> * * * * * * * *
>
> (Appendix to Briefs, pp. 529e-529i; Trial Tr. 890-894.)

From the foregoing words, the Court of Appeals divined that the district court found petitioner guilty of the offenses alleged in seven of the nine counts of the indictment brought against him, upon which the trial occurred. The Court of Appeals rather liberal construction of the foregoing words of the district court was stated as follows (496 F.2d at 1138 n. 8, slip. op., Appendix A, *post*, pp. 5215-5216):

> The trial court noted that the

> names of the various corporations involved were very similar and that it was quite understandable how potential investors were misled and that this confusion "was part of the scheme" used to defraud investors. He further commented that "there's no question but that the securities were unregistered, that they were sold, and that the mails were used in effecting those sales." Additionally, the district court observed that "[t]here is no evidence that this was a restricted sale, anybody who wanted to buy it could buy that came up and wanted to buy. There was no offer to show the financial status of the company." It is not necessary that special findings be filed simultaneously with the verdict. Indeed, one court has held they may be filed subsequent to sentencing. * * *

The foregoing is insufficient to establish proof beyond a reasonable doubt of every essential fact necessary to support a conviction for violating the three statutes involved in this case, and even if it were, the utterances by the Trial Court, independent of the

evidence (which was totally within the province of the Trial Judge to interpret and formulate conclusions of law), were insufficient to justify the finding by the Court below of such a comprehensive legal theory as stated in the opinion of the appellate court.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF TWO OTHER CIRCUIT COURTS OF APPEALS ON THE SAME SUBJECT MATTER.

Rule 19(1)(b) of the Rules of this Honorable Court indicates that one of the principal duties of this Court is to resolve conflicts among the Federal Circuit Courts on substantial questions of federal law.

The Ninth Circuit Court of Appeals, in *Howard v. United States*, 423 F.2d

1102 (9 Cir. 1970), a case in which the defendant moved for a bench trial and met no opposition untilspecial findings of fact were requested pursuant to the defendant's right under Rule 23(c), F.R.Cr.P., the Court of Appeals for the Ninth Circuit held (423 F.2d at 1104):

> *On our own motion* we notice that the district court refused to accept the waiver of jury trial both by the Government and by the defendant, unless and until the defendant signed a waiver of his earlier requested special findings. Under Rule 23(c), F.R.Cr.P., the defendant was entitled to those findings, and it would have been *reversible error* to have refused his timely request for them. * * * We cannot condone an avoidance of Rule 23(c) by the expedient of conditioning a jury waiver on waiver of special findings. The defendant's right to such findings is not trivial, and his exercise of that right is not to be impaired by the exertion of pressure from the court.

Similarly, but in a case nearly exactly on point with the instant case, the

Third Circuit Court of Appeals *en banc* held that the conditioning of waiver of jury trial by the Court upon waiver by the defendant of his right even to request that the Court specially find the facts and make conclusions of law thereupon, violated Rule 23(b), F.R.Cr.P. *United States v. Livingston*, 459 F.2d 797 (3 Cir. 1972). The Court summarized the proceedings in that case as follows (459 F.2d at 798):

> Prior to trial defendant requested that his case be tried to the court without a jury. Noting that "by waiving a jury, [defendant was] asking the judge to find the facts as well as the law," the court declined to grant the request "unless [the defendant]* * *agree[d] that the Court [would] not have to find findings of fact and conclusions of law." Defendant acceded to this condition and the case was heard without a jury. At the close of the evidence the court merely entered its order finding defendant "guilty." * * *

While the Trial Court made comments in two separate proceedings relative to this case which could have been construed as rulings on particular elements of the alleged offenses, those comments did not rule out the various defenses raised on petitioner's behalf nor did they establish every essential fact necessary to constitute a determination of the petitioner's guilt. In this regard, the *Howard* case involved comments from the bench at the time verdict was rendered, yet the Ninth Circuit, unlike the Court below, did not conclude that such comments cured the error manifested by the original act of the trial judge in conditioning the grant of a bench trial upon the waiver of special findings.

Also, the Third Circuit refused to look to the facts of that case to determine whether the Trial Judge was required to make special findings in that case because of the complexity of the legal and factual issues or the multiplicity of the legal theories upon which conviction could be based. It went straight to the initial error, saying (459 F.2d at 798):

> * * *Rather, we conclude only that the district court erred when it conditioned defendant's request for a non-jury trial on a waiver by him of his right to request that the court find the facts specially.

We feel it is of special significance that when the Advisory Committee on Rules submitted proposed Rule 23(c), F.R.Cr.P., to this Court for its approval, the porposed Rule contained the provision that, upon a defendant's

request, the Court "may" specially find the facts. This Court, having vast experience with matters of judicial review and knowing the importance of having the benefit of the thoughts of the trier of fact as to the precise facts found, changed the proposed Rule from discretionary to mandatory with respect to the special findings provision and, in such altered form, adopted Rule 23(c), F.R.Cr.P., in its present form (with respect to the point raised herein). *See* 2 Wright, *Federal Practice & Procedure*, Criminal §374, p. 15 (1969).

In addition to the fact that the Fifth Circuit's opinion in this case conflicts with the Ninth Circuit's opinion that the conditioning of a bench trial upon the waiver of defendant's right to special findings is

"reversible error," *Howard v. United States, supra,* at 1104, and with the Third Circuit's opinion that the waiver of jury trial could not be conditioned upon waiver of the "right to request" that the Court specially find the facts, *Livingston v. United States, supra,* at 798, the judgment and opinion of the Court below even conflicts with the alteration by this Court of the proposed Rule 23(c) from discretionary to mandatory. The provisions of Rule 23(c) were deemed necessary to intelligent appellate review as evidenced by this Court's action in making its provisions mandatory. That Rule should not be so easily circumvented as the record in this case demonstrates. This case presents an issue of great importance

to the administration of Federal Criminal Procedure and it should be reviewed and reversed by this Honorable Court.

2. THE OPINION OF THE COUR BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT, AND ITS DECISION CONFLICTS WITH THE INTENT OF THIS COURT, EVIDENCED BY ITS ACTIONS WITH RESPECT TO RULE 23(c), F.R.Cr.P., AND THE TIME THE SAID RULE WAS TENDERED TO THIS COURT FOR APPROVAL.

As noted before, this Court *sua sponte*, based upon its own experience in matters of reviewing a case on the basis of a general verdict, imposed the mandatory duty upon the Trial Courts, when they presided without a jury, to specially find the facts and to make detailed legal conclusions with respect thereto when a request for special findings is made by a defendant in a non-

jury case. 2 Wright, *op. cit., supra,* at 15. The Court below acknowledged that the Trial Court "specifically conditioned the right to a non-jury trial on the waiver of findings of fact." 496 F.2d at 1136. In actuality, as pointed out by the Third Circuit en banc in the *Livingston* case, the district court improperly conditioned the waiver of jury trial on a waiver even of petitioner's "right to request that the court find the facts specially." 459 F.2d at 798. The Court below, however, concluded that the district court, if it did err, cured the error when it made certain remarks from the bench. These remarks, however, were not written, nor were they made with the view that the Court of Appeals would employ the statements then made as a

basis for determining what it was, in fact, the district court determined by its general verdict of guilty.

2 Wright, *op. cit., supra,* at 16, points out, "There is grate risk, however, in failing to request special findings, since in such a case the appellate court may take the view of the facts that will support the judgment below." As instances where the appellate courts had apparently taken the view most favorable to the verdict, Professor Wright cited *Lustiger v. United States,* 386 F.2d 132 (9 Cir. 1967), cert. den. 390 U.S. 951 (1968), and *Blunder v. United States,* 169 F.2d 991 (6 Cir. 1948). Surely, this case will be found in the pocket part of the cited treatise as another example of reducing the barriers to easy conviction

if this Honorable Court does not act to correct the judgment below.

The problem with taking the view of the facts that will support the verdict when attempting to determine if the Trial Court has performed its mandatory duty is that the standards to be applied by an appellate court and by a trial court are altogether different. On appeal, the appellate court is bound, and because it is bound it is accustomed, to taking the view of the case most facorable to the Government under the doctrine of "aider by verdict." This Court commanded that it do so when reviewing the sufficiency of evidence in a case being reviewed upon appeal. *Glasser v. United States*, 315 U.S. 60 (1942). At the trial level, however, the opposite standard is sup-

posed to be applied when reaching a verdict. The Trial Court is required to take the view of the evidence in the light most favorable to the accused. *In re Winship*, 397 U.S. 358 (1970). Moreover, the Trial Court is required to find, and when it is required to specially find to put in writing, every fact necessary to support a conviction to have been proved beyond a reasonable doubt. *Id.*, at 364. By the Court of Appeals' reliance upon the comments of the Trial Court here, made at a time and under circumstances distinctly different from writing up special findings of fact and making conclusions of law, the Court of Appeals denied petitioner the basic assurance that he has been accorded the fundamental right at last

verbally stated in the *Winship* case. To hold that the Trial Court's comments served as a finding of proof beyond a reasonable doubt, under circumstances whete it was not necessary that the reasonable doubt standard be applied—— casual commentary net thought to be made the basis for review——, there is no assurance that the preponderance of evidence standard, referred to in the *Winship* case, was not applied here. Apparently, the trial court was convinced to some degree of defendant's guilt. From the record below, it cannot be said that the theory expressed by the Court of Appeals, interpolating the various comments of the trial judge on two separate occasions, was the same theory of guilt upon which the Trial

Court convicted. Such a determination could be made only if the Trial Court made express findings of fact or dictated into the record its reasons for judgemnt.*

This Court intended that Rule 23(c) be applied when it is invoked. This

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* The only way the casual remarks of the Trial Judge could arguably be curative of his failure to specially find the facts would be for him to mate referance to every fact essential to establish guilt beyond a reasonable doubt. To cure the error of failing to specially find the facts, the statement in the record would have to be self-sufficient to constitute the finding of facts required by Rule 23(c), F.R.Cr.P. A close reading of the casual remarks of the Trial Judge will not satisfy the requirements of formal compliance with Rule 23(c). It is respectfully suggested that the Court of Appeals should not be permitted to project those comments actually made by the finder of fact upon other evidence about which no comment was made and, correlating both sources of fact, conclude that the Trial Court's comments cured the defect in these proceedings.

Court also intended that the district courts should not coerce defendants into acquiescing in the demands of the judge, and calling that a waiver. This Court, by making the Rule mandatory, indicated a preference that the trial courts find the facts specially. As Professor Wright noted, if counsel does not do so he runs substantial risk that the appellate court, as it did here, will pursue the theory of the case most supportive of the verdict. Since this case poses several important issues relative to the application of Rule 23(c), and since, we believe, the Fifth Circuit's opinion would not square with a decision of this Honorable Court on the subject matter herein presented, we respectfully urge that this Court should grant

petitioner's application for a writ of certiorari and it should review and reverse the conviction obtained in the district court.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Court of Appeals for the Fifth Circuit, commanding the said Court to transmit the record in this cause to this Honorable Court for review of the judgment made therein. After due deliberation and argument upon the issues presented herein, this Honorable Court should reverse the judgment of the Court below.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Howard Nicholas JOHNSON, Defendant-Appellant.

No. 73-3519.

United States Court of Appeals,
Fifth Circuit.

June 28, 1974.

Defendant was convicted in United States District Court for the Northern District of Georgia at Atlanta, Albert J. Henderson, Jr., J., of selling unregistered securities, fraudulent sales of securities and mail fraud and he appealed. The Court of Appeals, Gewin, Circuit Judge, held that evidence that defendant, president of Georgia corporation which he merged with Florida corporate shell by use of forged signatures of directors of Georgia corporation, failed to inform investors that the corporations had been fraudulently merged and misled investors into believing they were purchasing stock in nonexistent corporation when in fact they were purchasing stock in Florida corporation supported finding that defendant obtained money by means of untrue statements, and that any error in trial court's conditioning grant of nonjury trial on waiver of special findings of fact was cured by findings from the bench.

Affirmed.

1. Criminal Law ⇨1177

Conviction on seven counts on each of which defendant was sentenced to concurrent three-year sentences would be affirmed if there was sufficient evidence under any count.

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2. Criminal Law ⇐1159.2(7)

If on appeal from conviction, viewing evidence in light most favorable to the Government, the record demonstrates that sufficient evidence was introduced from which a reasonably minded trier of fact could conclude that defendant was guilty beyond a reasonable doubt, the judgment must be affirmed.

3. Securities Regulation ⇐145

Evidence that defendant, president of Georgia corporation, effected merger of the corporation with a Florida corporate shell by use of forged signatures of directors of the Georgia corporation and failed to inform investors of the fraudulent merger and misled investors into believing they were purchasing stock in nonexistent corporation when in fact they were purchasing stock in Florida corporation established that defendant obtained money by means of untrue statements of material facts and omissions of material facts. Securities Act of 1933, § 17(a), (a)(2), 15 U.S.C.A. § 77q(a), (a)(2).

4. Criminal Law ⇐573

Claim of prejudice resulting from preindictment delay was not sustained by the record.

5. Criminal Law ⇐675

Trial court has right to control the orderly introduction of evidence and may prevent the needless repetition of evidence which is merely cumulative and does not shed light on new facts not previously disclosed.

6. Criminal Law ⇐675

Trial court properly exercised its discretion when, concerned with cumulative nature of the evidence offered by defendant, it directed defendant to proceed with new matters, and did not impermissibly limit defendant's ability to present an adequate and full defense.

7. Jury ⇐29(2)

One does not have a right to a nonjury trial unless the trial court so consents. Fed.Rules Crim.Proc. rule 23(c), 18 U.S.C.A.

8. Criminal Law ⇐257

Whether the defendant desires special findings should normally be his decision alone. Fed.Rules Crim.Proc. rule 23(c), 18 U.S.C.A.

9. Criminal Law ⇐257

Underlying purpose of civil rule pertaining to findings by the court and criminal rule directing trial court on request to find the facts specially in case tried without a jury is to afford reviewing court a clear understanding of the basis of the trial court's decision. Fed.Rules Crim.Proc. rule 23(c), 18 U.S.C.A.; Fed.Rules Civ.Proc. rule 52, 28 U.S.C.A.

10. Criminal Law ⇐257

It is not necessary that special findings in case tried without a jury be filed simultaneously with the verdict. Fed. Rules Crim.Proc. rule 23(a), 18 U.S.C.A.

11. Criminal Law ⇐1166(1)

Any error in trial court's conditioning defendant's request for a nonjury trial on waiver of special findings of fact was cured by trial court's findings from the bench. Fed.Rules Crim.Proc. rule 23(a), 18 U.S.C.A.

Appeal from the United States District Court for the Northern District of Georgia.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge:

Appellant Howard N. Johnson appeals from the judgment of conviction entered by the district court following his bench

trial. On January 24, 1973, a nine-count indictment was returned charging appellant with various violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1970), Section 5(a) of the Securities Act of 1933, 15 U.S.C. § 77e(a) (1970), and 18 U.S.C.A. § 1341 (Supp.1974) (mail fraud). Following his trial conducted from August 27th through August 31, 1973, the district judge found appellant guilty of seven counts of the nine-count indictment.[1] Appellant was sentenced to concurrent three-year sentences on each of the seven counts.

On this appeal, Johnson specifies four main contentions which he asserts require reversal of his conviction. First, he alleges that the Government did not introduce sufficient evidence to warrant his conviction. Second, he contends that the Government's preindictment delay impermissibly prejudiced his ability to present an adequate defense to the charges. Third, he alleges that the trial court improperly interfered with his ability to present a complete defense to the charges. Finally, he asseverates that he did not intelligently and voluntarily waive his right to specific findings of fact by the trial judge. After a careful review of the evidence introduced and the applicable and controlling legal principles governing the issues presented by appellant, we are firm in the belief that no prejudicial error was committed below and thus affirm.

I

[1, 2] Since appellant was sentenced to concurrent three-year sentences on each of the seven counts under which the district court found him guilty, if there was sufficient evi-

1. Appellant was found guilty of violating the four counts charging violations of Section 5 of the Securities Act, (selling unregistered securities) (Counts 6, 7, 8 and 9), two counts charging violations of Section 17(a) of the Securities Act, (fraudulent sales of securities) (Counts 1 and 2), and one count of mail fraud, 18 U.S.C. § 1341 (Count 3). The trial judge acquitted appellant on the two other counts of mail fraud (Counts 4 and 5).

dence under any count, his conviction should be affirmed.[2] Furthermore on appeal, our standard for reversing on the ground that there was insufficient evidence to warrant an appellant's conviction is circumscribed. Viewing the evidence in the light most favorable to the Government, if the record demonstrates that sufficient evidence was introduced from which a reasonably minded trier of fact could conclude that appellant was guilty beyond a reasonable doubt, the judgment must be affirmed.[3]

In Counts 1 and 2, appellant was charged and convicted of violating Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1970). That Section provides in relevant part:

> It shall be unlawful for any person in the offer or sale of any securities . . .
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The Government introduced evidence which fully placed appellant's acts within the prohibitions delineated above.

In early 1969, James Owens and Robert Doty decided that it would be a wise business venture to operate a television production business in Atlanta, Georgia. They envisioned that their business venture would produce television commercials and other special features for the local television stations.

2. Lavo v. United States, 355 U.S. 339, 362, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958); Thomas v. United States, 421 F.2d 940 (5th Cir. 1970); United States v. Abigando, 439 F.2d 127 (5th Cir. 1971).

3. *See* Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

However, one essential ingredient was missing from their business dream. They needed a large amount of capital. Accordingly, Owens and Doty began to investigate possible sources of funds to complement their production skills gained from long experience in the television industry.

Owens and Doty were introduced to a local Atlanta realtor, Oliver Coleman. Coleman informed the two entrepreneurs that he knew a man, Howard Nicholas Johnson, a Florida resident, who might be interested in investing in their new enterprise. Accordingly Johnson was contacted by Coleman and came to Atlanta where he reviewed the tentative plans for the new business. He readily agreed that Atlanta would be a good market for such an undertaking and agreed to finance it. On April 30, 1969, these proposals were formalized into a newly incorporated Georgia corporation by Owens and Doty. Johnson was named the president of the new corporation, Television Productions, Incorporated.

On May 15, 1969, Owens, Doty and Johnson entered into a formal agreement. Johnson agreed to guarantee the purchase of television equipment from the Ampex Corporation of California. Furthermore, he agreed to open a line of credit for the new corporation at the Fulton National Bank in Atlanta in the amount of $100,000. In return, Johnson was conveyed 50% of the stock in Television Productions, Inc Additionally, he was given the right to vote the retained shares of Doty and Owens in the event that the new corporation should fall in arrears on its debts for a period of three months.

Thus the traditional capitalistic mixture of expertise and finances was joined in hopes of producing profits. However, the events that developed subsequently demonstrated that appellant intended the new corporation for uses other than purely television production. On June 17, 1969, without the knowledge of Owens and Doty, appellant merged Television Productions, Incorporated with Sand and Seas Industries, Inc., a Florida corporate shell. This merger was consummated by the use of the forged signatures of Doty and Owens on the

merger plan. The plan stated that *all* the directors of Television Productions, Inc., had approved the merger at a board of directors meeting on June 6, 1969. Doty and Owens, both directors, testified that they were unaware of any such meeting and had never approved the merger. The newly merged Florida corporation was named Television Productions International Corporation (TPIC).

Johnson and an associate, J. Francke Fox, Jr., attempted to interest prospective investors in what was termed "Johnson's Georgia television company." These potential investors were taken on a tour of the Atlanta premises. Many sales of stock were culminated as a result of these visits and other contacts. As a further inducement for the sale of the stock, Johnson promised the investors that he would repurchase the stock within a certain length of time at a substantial profit to the purchaser.[4]

Furthermore, Johnson wrote the investors on stationery which listed the name of the corporation as "Television Productions International, Incorporated." At the time that Johnson wrote these letters, Television Productions International, Incorporated was not in existence.[5] The investors easily confused the names of the existing Florida corporation, Television Productions International Corporation and Television Productions International, Incorporated. Additionally, Johnson signed these letters as president of the then non-existent corporation. Thus, the investors were lead to believe that

4. The stock was selling for four dollars a share. Johnson agreed to repurchase it at six dollars a share in twelve or eighteen months from the original date of purchase.

5. Evidently, Owens and Doty had become increasingly dissatisfied with their relationship with Johnson and thus sought to organize their own corporation. They located an individual who was interested in financing their new corporation. On March 13, 1970, Owens and Doty incorporated in the State of Georgia the new corporation which they named Television Productions International, Inc. This was several months after Johnson had represented to the investors that he was president of this new corporation with which he had no connection.

they were buying stock in the Television Productions International Incorporated, a non-existent corporation, when in fact they were buying stock in the Florida corporation.

From their testimony, it is evident that the potential and actual investors were not experienced in trading in stock. They were not familiar with the television production business and had no prior experience with Television Productions, *Incorporated, Television Productions* International Corporation or Television Productions International, Incorporated. They were never furnished a prospectus of Television Productions International Corporation by Johnson. Prior to their purchase of stock, they were not informed that the stock was "restricted." Furthermore, it was apparent that the investors did not understand the consequences of buying restricted stock.

On December 11, 1969, appellant opened a special bank account at the Halifax National Bank of Port Orange, Florida in the name of Television Productions International, Incorporated. The only authorized signatures for this account were shown as Howard N. and Margaret Mary Johnson. In fact, Television Productions International, Incorporated was not in existence at this time and neither Johnson nor his wife was ever legally connected with the corporation. A fraudulent corporate resolution was presented to the bank to permit Johnson to open the account. Doty, Owens and the other Television Productions International Corporation stockholders were never informed of the Florida bank account even though $19,000 of the proceeds of the sale of TPIC stock were placed in the account which could be withdrawn personally by appellant and his wife.

When the time arrived for honoring Johnson's previous promises to the investors in TPIC to repurchase the stock, he refused. Thus not only did the investors buy stock in a corporation which they did not know existed but when the time ripened for honoring a primary impetus for their investment, Johnson refused to honor his previous commitments.

[3] We think the previously recited events amply demonstrate a violation of Section 17(a). ". . . [I]t is not necessary that the government prove that anyone was actually defrauded in order to show a violation of the statutes under which defendant was indicted." Estep v. United States, 223 F.2d 19, 22 (5th Cir. 1955). The evidence establishes that appellant "obtain[ed] money . . . by means of . . . untrue statement[s] of . . . material fact[s] . . . [and] . . . omissions[s] . . . of material fact[s] . . ." 15 U.S.C. § 77q(a)(2).

The appellant mislead the investors by failing to completely inform them of the nature of the corporations involved. He failed to inform the investors that Television Productions, Incorporated and Sand and Seas Industries, Inc. had been fraudulently merged without the knowledge or consent of the other directors of Television Productions, Incorporated. He misled the investors into believing that they were purchasing stock in Television Productions International, Incorporated, a then non existent corporation, when in fact they were purchasing stock in Television Productions International Corporation. Additionally, appellant did not disclose to the investors that the proceeds from the sales of TPIC stock would be deposited in a bank account over which he would have personal control without any benefit accruing to the corporation involved. Thus material facts were misstated and withheld from the potential and active investors which may have affected their decision to invest or not to invest. *See* S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968).

[4] Appellant's next two contentions are also without merit. First, he contends that the preindictment delay unduly prejudiced his defense of the charges made. This issue was never raised below until after appellant had presented his defense. Appellant has not asserted any grounds which substantiate his claim of prejudice resulting from the Government's delay. Accordingly his claim is without merit. *See*

United States v. Marion, 404 U.S. 307, 321–325, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

[5, 6] Second, appellant contends that the trial court impermissibly limited his ability to present an adequate and full defense by urging him to proceed with the presentation of his case. Our reading of the record shows that the district court was concerned with the cumulative nature of the evidence offered by appellant and therefore directed him to proceed with new matters. A trial court has the right to control the orderly introduction of evidence and certainly may prevent the needless repetition of evidence which is merely cumulative and does not shed light on new facts not previously disclosed. *See* United States v. Caracci, 446 F.2d 173, 177 (5th Cir. 1971). The record here demonstrates that the trial court was properly exercising its broad discretion. We find no abuse of that discretion.

[7] Finally, Johnson contends that the district court impermissibly conditioned his request for a non-jury trial on the waiver of special finding of facts by the court. Rule 23 of the Federal Rules of Criminal Procedure reads in relevant part:

> (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.
>
> * * * * * * * * * *
>
> (c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

It is basic textbook law that one does not have a right to a non-jury trial unless the trial court so consents. Singer v. United States, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). When the defendant requests a bench trial, may the district court condition the request on the waiver of specific findings

of fact by that court as provided by Rule 23(c)? A reading of the record in this case establishes that following appellant's trial the district court issued sufficient oral findings of fact to cure whatever error might have arguably resulted from its refusal to make special findings pursuant to Rule 23(c). Thus we pretermit the basic issue here presented for a later case demonstrating actual prejudice.

At the commencement of appellant's trial, the district judge addressed appellant and his counsel. The following discussion was held:

THE COURT: You have the right, if you so desire, to waive a jury trial, that is, by your own agreement not to have a jury trial. Do you understand that?

MR. JOHNSON: Yes, sir.

THE COURT: I am also required under the law in a non-jury trial to make findings of fact and conclusions of law, written findings of fact and conclusions of law. However, I have already advised your lawyer that in the event you would not waive that right that I would proceed to try it by jury, because I just don't have the time in which to review it later on and make findings of fact and conclusions of law.

You have the right to waive the Judge's written findings of fact and conclusions of law and have him pronounce judgment at the conclusion of the trial—

MR. JOHNSON: Yes, sir.

THE COURT: —on the various counts. Now, do you understand that?

MR. JOHNSON: Yes, sir.

THE COURT: And do you waive your right to have the Judge make findings of fact and conclusions of law in this case?

MR. JOHNSON: Yes, sir, I do.

Thus the record demonstrates that the district court specifically conditioned the right to a non-jury trial on the waiver of findings of fact.

The precise issue which is urged by appellant today has only been resolved by two other circuit court opinions. In Howard v. United States, 423 F.2d 1102 (9th Cir. 1970), the appellant made a specific request for findings of fact. The trial court, however, refused to permit a bench trial until the appellant executed a waiver of his earlier request of special findings. The Ninth Circuit, in strong language, rejected the trial court's conditions for a non-jury trial, stating:

> We cannot condone an avoidance of Rule 23(c) by the expedient of conditioning a jury waiver on a waiver of special findings. The defendant's right to such findings is not trivial, and his exercise of that right is not to be impaired by the exertion of pressure from the court.

423 F.2d at 1104. First, it should be noted that the *Howard* case is somewhat distinguishable from the present fact situation. Unlike appellant Howard, Johnson never requested specific fact findings. Second, at no time during the trial or following trial, did Johnson request special findings. In *Howard* the court gave emphasis to a *timely* request for findings in the following statement:

> Under Rule 23(c) of the Federal Rules of Criminal Procedure the defendant was entitled to those findings, and it would have been reversible error to have refused *his timely request for them.* (emphasis added)

423 F.2d at 1104. Finally, while the trial court in *Howard* did not make any special findings, the trial court in the instant case at the time it rendered its verdict and at the sentencing hearing, did make comments from the bench which cured its initial refusal to make specific findings of facts. These comments will be discussed below.

The *Howard* opinion was adopted as the guiding rule of law by the Third Circuit sitting *en banc* in United States v.

Livingston, 459 F.2d 797 (3d Cir. 1972). The Third Circuit posed the issue presented as ". . . whether it was permissible for the district judge to condition his grant of defendant's request for a non-jury trial on defendant's waiver of findings of fact and conclusions of law." 459 F.2d at 797. Importantly, *Livingston* differed from *Howard* in that appellant Livingston never requested findings of fact. *Livingston* like the instant case involved the issue of whether the district court may condition a non-jury trial on waiver of specific findings by the court even where there never was a request for findings by the defendant and he specifically waived his rights at the behest of the trial court.

In response to the issue presented, the Third Circuit held:

> . . . [T]he district court erred when it conditioned defendant's request for a non-jury trial on a waiver by him of his right to request that the court find the facts specially.
>
> * * * * * * * * * *
>
> Findings of fact are essential to proper appellate review of a conviction resulting from a non-jury trial. This was an important consideration when the present text of Rule 23(c) was promulgated, altering pre-existing law and *requiring* the trial judge to make special findings, if requested.

459 F.2d 798. Accordingly, the case was not reversed but was remanded to the district court so that it could make the special findings of fact. *See also*, United States v. Snow, 484 F.2d 811, 812 (D.C. Cir. 1973) (where district court recognized the need for special findings but through inadvertence failed to do so, the case was remanded for special findings); Haywood v. United States, 393 F.2d 780 (5th Cir. 1968) (where general findings made by the district court were inconsistent and confusing and the right of allocution was denied, the case was reversed and remanded).

[8] In some situations, it may be impermissibly coercive for a trial court to condition a non-jury trial on the waiver of special findings of fact. Special findings are necessary, espe-

cially in a complex case, for an intelligent appellate review of a defendant's contentions. Whether the defendant desires special findings should normally be his decision alone.

[9, 10] The Government vigorously contends, however, that the trial court through comments from the bench at the time it delivered its judgment and subsequently at the sentencing hearing elucidated the grounds on which it based its judgment. We agree.[6] Although the reasons delineated at these two hearings were not as complete as they could be, they do suffice as a basis for intelligent appellate review.[7] These observations by the trial court demonstrate to us that the court applied the correct legal principles to the instant case.[8]

6. We have held previously that findings of fact made from the bench following the trial of a civil case may be sufficient to meet the mandatory requirements of Rule 52, F.R.Civ.P. *See* Movible Offshore, Inc. v. M/V Wilken A Falgout, 471 F.2d 268 (5th Cir. 1973). *See also* Amplex of Maryland, Inc. v. Outboard Marine Corp., 380 F.2d 112 (4th Cir. 1967). Of course, whether oral findings are sufficient will depend on the circumstances presented by each case.

7. Although not completely applicable to the instant criminal case, our court has previously enunciated standards for determining whether a trial court's findings of fact are adequate in a civil suit. In Gulf King Shrimp Company v. Wirtz, 407 F.2d 508, 515 (1969), the court explained that:

> "The purpose of F.R.Civ.P. 52 is to afford the appellate court a clear understanding of the basis of the trial court's decision. Featherstone v. Barash, 10 Cir. 1965, 345 F.2d 246. 'The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision.' Carr v. Yokohama Specie Bank, Limited, 9 Cir. 1952, 200 F.2d 251, 255. 'Findings may be sufficient if they permit a clear understanding of the basis of decision of the trial court, irrespective of their mere form of arrangement.' Featherstone v. Barash, *supra*, 345 F.2d at 250."

The underlying purpose of Rule 52, F.R.Civ.P., and Rule 23(c), F.R.Cr.P., is the same. In this case, the trial court has made adequate findings for purposes of our review. *See also* Lettsome v. United States, 434 F.2d 907, 909 (5th Cir. 1970).

8. The trial court noted that the names of the various corporations involved were very similar and that it was quite understandable how potential investors were misled and that this confusion "was part of the scheme" used to defraud investors. He further commented that "there's no question but that the securities were unregistered, that

[11] It is not necessary for us to answer the precise issue presented to the Ninth and Third Circuits since we hold that even assuming that error was committed below by the trial court's imposition of the condition, this error was nevertheless cured by its subsequent findings from the bench.

Accordingly, the judgment of the district court is

Affirmed.

they were sold and that the mails were used in effecting those sales." Additionally the district court observed that "[t]here is no evidence that this was a restricted sale, anybody who wanted to buy it could buy that came up and wanted to buy. There was no offer to show the financial status of the company." It is not necessary that special findings be filed simultaneously with the verdict. Indeed, one court has held they may be filed subsequent to sentencing. *See* United States v. Ogden, 484 F.2d 1274 (9th Cir. 1974).

APPENDIX B

by reason of the investment letter.

According to the Continental Tobacco case and the facts in this case, it seems to be much stronger in that case on that particular issue.

There is no evidence that this was a restricted sale. Anybody who wanted to buy it could buy that came up and wanted to buy. There was no offer to show the financial status of the company. I attach much more significance in my judgment to the use of the corporations, especially the names, as manipulating facts in the violations charged. I therefore find the defendant guilty also of Counts Six through Nine.

And to sum up, in summary, I find the defendant guilty of One, Two and Three,

not guilty as to Counts Four and Five, guilty as to Counts Six, Seven, Eight and Nine.

Mr. Taylor, would you please prepare a judgment accordingly and present it to me sometime today.

Mr. Baird, would you have your client please report to the Probation Officer, and he will notify your client of a sentencing date which will be sometime later.

THE CLERK: Judge, this is a new thing we [End Tr. 881, App. 526]

[Tr. 883; A. 527]

(Atlanta, Fulton County, Georgia; Friday, September 28, 1973, 9:30 a.m., in open court.)

- - -

THE COURT: All right, gentlemen, the purpose of the hearing this morning

is for passing sentence in two cases. Are there any other matters that need to be brought up, Mr. Taylor --

MR. TAYLOR: No, sir.

THE COURT: -- before we proceed with the sentences?

MR. TAYLOR: No, sir, I don't believe so.

THE COURT: All right, sir.

- - -

THE COURT: All right, No. 28,005, Howard Nicholas Johnson.

(Whereupon, the defendant approached the bench with counsel.)

- - -

THE COURT: Mr. Johnson, did you receive a copy of the prior record? It doesn't show any prior convictions, but did you receive it?

MR. JOHNSON: Yes, I did, sir.

THE COURT: Is it correct?

MR. JOHNSON: Item No. 3, it says "disposition unknown". It was dismissed. [Tr. 884; A. 528]

THE COURT: All right, sir.

MR. JOHNSON: And 4, 5 and 6 were all the same, a $25.00 check that my daughter wrote, and that was all dismissed.

THE COURT: Well, it doesn't show any convictions.

Is there anything, Mr. Baird, you would like to say before sentence is pronounced?

MR. BAIRD: Your Honor, this is a case that I, I must say, that I saw entirely different from Your Honor.

The man followed legal advice all

the way through on this thing. There was no intent, we still submit, to violate any law of the United States. He suffered a tremendous financial loss himself in this investment. The people that invested in it, they knew what they were doing.

The technical name of the corporation, I still don't see the real traumatic impact of that. If Johnson's head hadn't come loose, and I do not know whether -- I know that Mr. Roberts received a copy of the medical records from the Datona Beach hospital, and the doctor was supposed to write a letter about that. Whether it has been received I do not know.

THE COURT: It's in the file.

[Tr. 885; A. 529]

MR. BAIRD: It is?

THE COURT: Yes, sir.

MR. BAIRD: All right, sir.

If his head hadm't come loose, and he was afraid he was cashing in his chips, I believe this company would have still made a go of it, because he could have been a very successful man.

He lost everything in the world. He sold out everything he had. And in this particular company he put, plus what the people that wanted to get into it, he lost well over a hundred thousand dollars of his own money in the thing.

I have known—I knew Nick in two matters before this matter in Tennessee. I did not represent him in Tennessee. In fact, one of the cases, it wasn't involving him, it was the sale of a motel

here in Atlanta, Nick was the purchaser of the thing at the time, and the case was tried right here in this room, trying to hoodwink he and the real estate salesman out of their commission and what they were due them. In that case we won it right here in this room. I represented another person. He was just a witness.

I am familiar with this case in Tennessee where it says it was dismissed on a technicality. I represented another man in that case, the man that signed the note.

Prior to the time this case was even indicated in Tennessee Judge Frank Johnson over in Montgomery, Alabama, had ruled in a suit by a bank that the insurance policy, a single-pay premium

policy on Nick Johnson's life was a valid, good policy. The insurance company would not pay the bank. It was worth a hundred and thirty-something thousand dollars, a single premium insurance policy. I got the president of the company, and I said, "Why didn't you pay this?" He said, "I thought I could sell it cheaper."

My man was acquitted, and they found the president of the insurance company and Mr. Johnson guilty because he put up an insurance policy, paid-up insurance policy, and all the testimony at the court was it was a valid, good policy.

A motion for new trial was filed, and Judge Wilson --Judge Taylor, Judge Bob Taylor, gave a new trial, and by that

time the insurance company, the receiver for the State of Alabama paid off the insurance company and the Government dropped the case. I was flabbergasted there.

Nick is a hard-working boy. He's raised four--three grown children and adopted three little tiny, physically deformed children. I think the oldest one is four.

MR. JOHNSON: That's right.

MR. BAIRD: And he's done a magnificent job with those children who are physically handicapped, and they are almost perfectly normal children now, he and his wife.

Nick has been a businessman. I am in the process now of obtaining Government records from New York. The testimony from this stand was he made certain

statements, and he wasn't even in the United States at that time. It takes a long time to get those records and trace back.

He served his country well. He's highly decorated in the war. I didn't believe all the bullet hole stories I was told. I took him in the bathroom at the office and made him undress, and I can tell you there are twenty-two bullet holes through this man's body. He's just a mass of scars, plus his skull, it's been operated on many times.

If he was a crook, there are a lot of ways he could have done things that wouldn't have shown whatsoevery, and he's just not a crook. I have known him a long time.

This thing about--this thing in the

WALL STREET JOURNAL that came out somewhat in this trial, we have submitted documents from the Florida Institute of Technology where they even demanded WALL STREET JOURNAL retract the statement about houseboats, and there weren't two, it was just one. Nick himself told them to check it out. It was put up as security, and it was $10,000.00 on that. He was going to give the Florida Institute of Technology the balance of the $10,000.00 for the houseboat.

You see, I might say a lot of people for tax writeoffs and things really give this school a lot of boats, and they sell a lot of boats, give them as tax deduction things to the Florida Institute of Technology. All those papers are there.

Judge, we have offered to make restitution to the amount the people lost or anything. The very evidence of the Government witnesses was that they bought the things from him and even stopped the checks and didn't pay the checks that Nick was going to use to pay back the investors of the company with, and the order of the district court, the bankruptcy court, stopped his suit even in the Civil Court of Fulton County.

I told the Court at that time, right after the argument, I was going to sue Doty and Owens, and I certainly am.

The only thing we can do is--I just--well, I think Nick is too proud to beg for himself, but I will beg for

him, and I have never begged in my life. I think this is certainly a case that merits and warrants probation to--

I might break up if I said anything else. I feel very deeply about this case.

THE COURT: Mr. Johnson, anything you would like to say before sentence is pronounced?

MR. JOHSNON: No, sir.

THE COURT: Well, gentlemen, I would agree with Mr. Baird on some of the things he said. I don't question-- I didn't question during the trial, nor do I question now, Mr. Johnson's war record. No question in my mind he was awarded certain medals for bravery and other medals probably of less significance, that he was wounded. Nor do I question what he did for his country, regardless

of any medals. Having served in World War II, I know the hardships and deprivations and heroism of men in that war.

MR. BAIRD: Sir, may I interrupt just one second to tell you something else. Those records don't reflect that this man was assigned outside the United States to the Free French.

THE COURT: Yes. They reflect that.

MR. BAIRD: They do?

THE COURT: Yes, sir.

MR. BAIRD: I haven't --

THE COURT: That's what I was referring to.

MR. BAIRD: Anything that happened, the United States would have denied having known him.

THE COURT: It reflects he fought

with the Free French.

Nor do I question the seriousness of his injuries. I think that was rather vividly displayed during the trial of the case, not because he wanted it that way, I din't mean to say that at all, but he couln't help it, and for that reason I regret it.

I'm also aware of his record of public service as a senator in the State of Kentucky. I don't question that.

But, gentlemen, those of us who serve in public life don't have any license to violate the law. I made a judgment based upon the evidence I heard that the defendant was guilty of seven counts--

MR. BAIRD: Yes, sir.

THE COURT: --in this indictment.

whether I am right on that or not will depend upon the appellate decision, obviously. But I felt I was right. Otherwise, I would not have done it. But, if I felt there was any doubt really of his innocence I would have so found.

The problem in a case like this, we are dealing with what is known as white collar crimes. We send people off to prison every day for stealing, rape, for assualt, narcotics violations, and I guess we have the great national mania about those things. But we also sometimes don't give enough attention to where these people get their justification for doing these things, and that is they see others who are more affluent that are able to live on the edge of the

law and sometimes veer over the wrong side and then they get away with it.

One of the problems we have in the Country today, I think, is that there are too many people who are commiting violent crimes really in the name of right, that they have a right to do this. This has been something that's been very disturbing to me, and I think other Americans. And they say, "Well, people in public life, people in business are allowed to steal every day and get away with it."

In spite of his record both in the service and in public life, in spite of the fact he's had injuries, I do not feel that that is any license at all to violate the law. I considered that he violated the law.

I do not consider, as you do, the insignificance of the corporate names that were involved in this case. In fact, I considered them to be very significant.

MR. BAIRD: Well--

THE COURT: And I consider them to be significant, Mr. Baird, because corporations were used and manipulated.

Now, I will agree that most any person who's got a high school education or any education at all can sit and look at something and tell whether or not it is the same name, but human experience has shown us that people don't do that a lot of times, and, so, Congress has seen fit to pass laws for the protection of people who don't protect themselves.

Sometimes, unfortunately, I am one

of those who doesn't protect himself. However, I don't usually say anything about it, because I'm a little ashamed of it *because* I was stupid. But that happens to all of us.

I can well understand how the people who took these certificates didn't examine them with that much scrutiny, because it had "Television Productions" on it. One of them might have had "Inc.", another might have had something else on the back of it, at the end of it, which gave them different names, and they get by the test in the Secretary of State's office many times when probably they shouldn't, because there's too much similarity. Nevertheless, they get by.

I feel that that was not only part--not only significant but was part of the

scheme, and, if I didn't feel that way, I probably wouldn't have found him guilty. Not that alone; there were other factors, too.

Regardless of their innocence or guilt involved in the matter, these two gentlemen that went to Mr. Johnson initially to get him to be their angel, so to speak, but the angel didn't turn out quite to be an angel, and, in spite of their ineptness in some matters, I don't know that they had any involvement one way or the other, they still turned out, they didn't get -- they didn't know what was going on in Florida, the corporation was being used by Mr. Johnson and his wife.

Whether his wife did that at his insistence or not, as many wives do, I

don't know. That's neither here nor there.

I am taking into consideration that Mr. Johnson doesn't have any prior record, but I am also taking into consideration the seriousness of this offense, and I feel there is a duty on the part of courts, not only this court but all courts, to view this type crime just as seriously as it views crimes of violence, and I view this crime just as seriously as I view crimes of violence.

So, in view of that, in view of what I have said, I am going to sentence Mr. Johnson to the custody of the Attorney General for a period of three years on Counts One, Two, Three, Six, Seven, Eight and Nine, the sentence on each count to run concurrently with each

other, which means that it is a three-year sentence.

Now, Mr. Johnson, under the law you have a right to appeal your case.

And you have the right, of course, to choose your attorney that you desire to use to appeal that case, if, of course, you privately retain him.

However, if you cannot afford to hire an attorney and do not have the funds with which to secure legal services or legal advice, then the Court, upon a showing, will appoint an attorney to represent you.

Do you understand that?

MR. JOHNSON: Yes, sir.

THE COURT: Do you desire to appeal your case, sir?

CERTIFICATE

I certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General of the United States by United States Mail, first class postage prepaid, by mailing 5 copies of same to him at his official address in the office building for the Department of Justice, Washington, D.C., this ____ day of _____, 1974.

_____
STEWARD CARTER
Attorney at Law

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-514

HOWARD NICHOLAS JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in conditioning his request for a non-jury trial on the waiver of special findings of fact by the court.

Following a non-jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on four counts charging the selling of securities without registration, two counts charging the fraudulent selling of securities, and one count charging mail fraud, in violation of 15 U.S.C. 77e(a), 15 U.S.C. 77q(a), and 18 U.S.C. 1341. He was sentenced to three years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A; 496 F. 2d 1131).

The facts are stated in the opinion of the court of appeals (Pet. App. 44-47; 496 F. 2d at 1133-1135). Briefly, they show that in 1969, James Owens and Robert

Doty decided to establish a television production business in Atlanta, Georgia, that would produce television commercials and special features for the local television stations.

Petitioner was introduced to Owens and Doty by a local realtor as an interested investor in the new business. Petitioner reviewed the tentative plans and agreed to finance the business. On April 30, 1969 the business was incorporated by Owens and Doty as Television Productions, Incorporated, and petitioner was named president.

On May 15, 1969, a formal agreement was executed whereby petitioner agreed to guarantee the purchase of television equipment and to open a line of credit for the corporation. In return, petitioner received 50 percent of the corporation's stock and the right to vote the retained shares of Doty and Owens, if the corporation should fall in arrears on its debts for three months.

On June 17, 1969, without the knowledge of Owens or Doty, petitioner merged Television Productions, Incorporated with Sand and Seas Industries, Inc., a Florida corporate shell, by forging the signatures of Doty and Owens on the merger plan. The plan stated that the merger had been approved on June 6, 1969, by all the directors of Television Productions, Inc. The merged Florida corporation was named Television Productions International Corporation.

Petitioner and one J. Francke Fox, Jr. took potential investors on a tour of the Atlanta premises and sold stock in the newly merged corporation. As an inducement to purchasers to buy the stock, petitioner agreed to repurchase the shares, which were sold at $4 per share, for $6 per share in 12 or 18 months from the date of purchase. He further wrote to the investors on stationery

with the heading "Television Productions International, Incorporated," which firm was not yet in existence at the time when the letters were written, and signed the letters as president. The investors were in fact buying stock in Television Productions International Corporation, the Florida corporation. On March 13, 1970, Owens and Doty, who had been dissatisfied with petitioner, found a new investor and formed a Georgia corporation named Television Productions International, Inc.

On December 11, 1969, petitioner opened a bank account at the Halifax National Bank of Port Orange, Florida, in the name of Television Productions International, Incorporated, which was not in existence at the time, and presented to the bank a fraudulent corporate resolution. Doty, Owens and other Television Productions International Corporation stockholders were never informed of the Florida bank account, although $19,000 of the proceeds of the sale of the stock of that corporation were placed in the account and could be withdrawn by petitioner and his wife. Thereafter petitioner refused to honor his agreement to repurchase the stock.

Prior to trial the district judge and petitioner had the following discussion (Pet. App. 50; 496 F. 2d at 1136):

THE COURT:	You have the right, if you so desire, to waive a jury trial, that is, by your own agreement not to have a jury trial. Do you understand that?
MR. JOHNSON:	Yes, sir.
THE COURT:	I am also required under the law in a non-jury trial to make findings of fact and conclusions of law, written findings of fact

and conclusions of law. However, I have already advised your lawyer that in the event you would not waive that right that I would proceed to try it by jury, because I just don't have the time in which to review it later on and make findings of fact and conclusions of law.

You have the right to waive the Judge's written findings of fact and conclusions of law and have him pronounce judgment at the conclusion of the trial—.

MR. JOHNSON: Yes sir.

THE COURT: —on the various counts. Now, do you understand that?

MR. JOHNSON: Yes, sir.

THE COURT: And do you waive your right to have the Judge make findings of fact and conclusions of law in this case?

MR. JOHNSON: Yes, sir, I do.

Petitioner's contention that the trial court erred in conditioning his request for a non-jury trial on the waiver of special findings of facts by the court was rejected in the opinion of the court of appeals. We rely upon the following portion of the opinion (Pet. App. 51-54; 496 F. 2d at 1136-1138):

> The precise issue which is urged by appellant today has only been resolved by two other circuit court opinions. In *Howard* v. *United States*, 423 F. 2d 1102 (9th

Cir. 1070), the appellant made a specific request for findings of fact. The trial court, however, refused to permit a bench trial until the appellant executed a waiver of his earlier request of special findings. The Ninth Circuit, in strong language, rejected the trial court's conditions for a non-jury trial, stating:

> We cannot condone an avoidance of Rule 23(c) by the expedient of conditioning a jury waiver on a waiver of special findings. The defendant's right to such findings is not trivial, and his exercise of that right is not to be impaired by the exertion of pressure from the court.

423 F. 2d at 1104. First, it should be noted that the *Howard* case is somewhat distinguishable from the present fact situation. Unlike appellant Howard, Johnson request special findings. In *Howard* the court at no time during the trial or following trial, did Johson request special findings. In *Howard* the court gave emphasis to a *timely* request for findings in the following statement:

> Under Rule 23(c) of the Federal Rules of Criminal Procedure the defendant was entitled to those findings, and it would have been reversible error to have refused *his timely request for them.* (emphasis added)

423 F.2d at 1104. Finally, while the trial court in *Howard* did not make any special findings, the trial court in the instant case at the time it rendered its verdict and at the sentencing hearing, did make comments from the bench which cured its initial refusal to make specific findings of facts. These comments will be discussed below.

The *Howard* opinion was adopted as the guiding rule of law by the Third Circuit sitting *en banc* in *United States* v. *Livingston,* 459 F. 2d 797 (3d Cir. 1972). The Third Circuit posed the issue presented as ". . . whether it was permissible for the district judge to condition his grant of defendant's request for a non-jury trial on defendant's waiver of findings of fact and conclusions of law." 459 F.2d at 797. Importantly, *Livingston* differed from *Howard* in that appellant Livingston never requested findings of fact. *Livingston* like the instant case involved the issue of whether the district court may condition a non-jury trial on waiver of specific findings by the court even where there never was a request for findings by the defendant and he specifically waived his rights at the behest of the trial court.

In response to the issue presented, the Third Circuit held:

> . . . [T]he district court erred when it conditioned defendant's request for a non-jury trial on a waiver by him of his right to request that the court find the facts specially.
>
> * * * * *
>
> Findings of fact are essential to proper appellate review of a conviction resulting from a non-jury trial. This was an important consideration when the present text of Rule 23(c) was promulgated, altering preexisting law and *requiring* the trial judge to make special findings, if requested.

459 F.2d 798. Accordingly, the case was not reversed but was remanded to the district court so that it could make the special findings of fact.

See also, *United States* v. *Snow*, 484 F. 2d 811, 812 (D.C. Cir. 1973) (where district court recognized the need for special findings but through inadvertence failed to do so, the case was remanded for special findings); *Haywood* v. *United States*, 393 F.2d 780 (5th Cir. 1968) (where general findings made by the district court were inconsistent and confusing and the right of allocution was denied, the case was reversed and remanded).

In some situations, it may be impermissibly coercive for a trial court to condition a non-jury trial on the waiver of special findings of fact. Special findings are necessary, especially in a complex case, for an intelligent appellate review of a defendant's contentions. Whether the defendant desires special findings should normally be his decision alone.

The Government vigorously contends, however, that the trial court through comments from the bench at the time it delivered its judgment and subsequently at the sentencing hearing elucidated the grounds on which it based its judgment. We agree.[6] Although the reasons delineated at these

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6. We have held previously that findings of fact made from the bench following the trial of a civil case may be sufficient to meet the mandatory requirements of Rule 52, F.R. Civ. P. See *Movible Offshore, Inc.* v. *M/V Wilken A Falgout*, 471 F. 2d 268 (5th Cir. 1973). See also *Amplex of Maryland, Inc.* v. *Outboard Marine Corp.*, 380 F. 2d 112 (4th Cir. 1967). Of course, whether oral findings are sufficient will depend on the circumstance presented by each case.

two hearings were not as complete as they could be they do suffice as a basis for intelligent appellate review.[7] These observations by the trial court demonstrate to us that the court applied the correct legal principles to the instant case.[8]

It is not necessary for us to answer the precise issue presented to the Ninth and Third Circuits since we hold that even assuming that error was committed below by the trial court's imposition of the condition, this error was nevertheless cured by its subsequent findings from the bench.

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7. Although not completely applicable to the instant criminal case, our court has previously enunciated standards for determining whether a trial court's findings of fact are adequate in a civil suit. In *Gulf King Shrimp Company* v. *Wirtz*, 407 F. 2d 508, 515 (1969), the court explained that:

> "The purpose of F.R. Civ. P. 52 is to afford the appellate court a clear understanding of the basis of the trial court's decision. *Featherstone* v. *Barash*, 10 Cir. 1965, 345 F.2d 246. 'The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision.' *Carr* v. *Yokohama Specie Bank, Limited*, 9 Cir. 1952, 200 F. 2d 251, 255. 'Findings may be sufficient if they permit a clear understanding of the basis of decision of the trial court, irrespective of their mere form of arrangement.' *Featherstone* v. *Barash, supra*, 345 F. 2d at 350."

The underlying purpose of Rule 52, F.R. Civ. P., and Rule 23(c) F.R. Cr. P., is the same. In this case, the trial court has made adequate findings for purposes of our review. See also *Lettsome* v. *United States*, 434 F.2d 907, 909 (5th Cir. 1970).

8. The trial court noted that the names of the various corporations involved were very similar and that it was quite understandable how potential investors were misled and that this confusion "was part of the scheme" used to defraud investors. He further commented that "there's no question but that the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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securities were unregistered, that they were sold and that the mails were used in effecting those sales." Additionally the district court observed that "[t]here is no evidence that this was a restricted sale, anybody who wanted to buy it could buy that came up and wanted to buy. There was no offer to show the financial status of the company." It is not necessary that special findings be filed simultaneously with the verdict. Indeed, one court has held they may be filed subsequent to sentencing. See *United States* v. *Ogden*, 484 F. 2d 1274 (9th Cir. 1974).